UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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RIO TINTO,

Plaintiff,

v. 14 CV 3042(RMB)

VALE, S.A., et al.,

Defendants.

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New York, N.Y.
December 1, 2014
9:45 a.m.

Before:

HON. RICHARD M. BERMAN,

District Judge

APPEARANCES

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BY: PAUL SUMMIT

(Case called; in open court)

THE COURT: Please be seated. So as I mentioned to you I think in an endorsement that we're happy to have brief oral argument on the venue issue. Before we do that I lost track somewhat of where you are on terms of discovery.

MR. LYLE: Good morning, your Honor. Michael Lyle on behalf of the plaintiff Rio Tinto. Your Honor, discovery is proceeding. We've had begun production of documents on both sides and we've had a number of hearings in front of Judge Peck who continues to move us along. There are a couple of issues that we are meeting and conferring about and will likely be back in front of Judge Peck on some of those in the next week or so. So discovery is proceeding. We have not yet begun depositions or anything of the like. At this stage we're really at the written discovery point.

THE COURT: So I am happy to hear very briefly from the movant. How are you going to divide or are you?

MR. LIMAN: Your Honor, what we propose is that for Vale, I will argue that the forum selection clause is mandatory and Mr. Filardo will argue the traditional forum non conveniens factors.

THE COURT: Okay.

MR. LIMAN: Your Honor, what we would urge is that there are two independent bases for dismissal here. Both the mandatory form selection clause and the traditional factors --

THE COURT: I got that. I am pretty far along in the review.

MR. LIMAN: Your Honor, what I would propose is you have got a lot of pieces of paper in front of you. I would just highlight four points that I think we would urge your Honor to focus on as you look through the papers.

THE COURT: Right.

MR. LIMAN: The first is the legal stance. Your Honor is familiar with the Atlantic Marine standard that requires that forum selection clauses be given controlling weight except in the most exceptional circumstances. What we would also urge your Honor to focus on is the fact --

THE COURT: It strikes me that only applies if you know what the forum selection clause says.

MR. LIMAN: That's correct, your Honor.

THE COURT: I don't think it is as open and shut as you have suggested when you said let's have this venue motion first because you think it is dispositive as it were. So doesn't seem clear cut to me at all.

MR. LIMAN: Your Honor, one thing we would say is that both lords in this case are of the view that the clause could have been better written than the lawyers who drafted it.

THE COURT: Who did draft it?

MR. LIMAN: It was drafted by lawyers on both sides. I don't right now know who the lawyers are. I do think it is

important to focus on the standard in the Second Circuit, which is the ultimate question is is the clause mandatory or is it permissive? What the Second Circuit says in the *Phillips* case is that there are two independent ways in which a clause can be considered to be mandatory. One is if it uses the language of exclusivity. The other is if it uses obligatory venue language. And that obviously makes sense, your Honor. It is not only the law of the circuit but as your Honor is aware parties not infrequently draft mandatory clauses, which require litigation to be brought in one of two venues. Each venue is not exclusive with respect to the other; but nonetheless it is mandatory.

THE COURT: So which case such as that are you principally relying on where there were two jurisdictions that exclusively are the locus of venue?

MR. LIMAN: Your Honor, we would urge you to focus on *Phillips*. Itself doesn't use the language of exclusivity and I believe in *Phillips* it was federal or state. If you would look also --

THE COURT: Do you have a case comparable to yours where there are two countries and between the two of them they are the only places where suit can be brought?

MR. LIMAN: Your Honor, I don't offhand. I don't think the plaintiffs have cited a contrary case, but I do not offhand.

THE COURT: Well, that is what I am asking: Is there such a case?

MR. LIMAN: There may be cases like that.

THE COURT: If you don't have it offhand, and I take it you've done a thorough review, there is no such case otherwise you would have it on-hand as it were.

MR. LIMAN: I am not sure that that is the case, your Honor. What I would ask is that we can supply you with a case within a couple of days.

THE COURT: If you haven't done it by now, you haven't found it because obviously that would support your case. I am not saying there is one either. That is what would be most helpful.

MR. LIMAN: This is the second point. There are a series of cases where the identical language that was used in this contract is used in other forum selection clauses the "shall be brought" and the courts have held that that language is mandatory.

What I would focus your Honor on is the decision by Judge Spatt in the *Express Scripts* case in the Eastern District. Judge Spatt cites a number of cases at the bottom of page 23 of the printout for the proposition that where a forum selection clause provides that a dispute shall be brought in a particular venue, that language is to be considered to be mandatory.

THE COURT: I think, though, in this situation you really rather than argue the Black letter law as it were, it is really the facts of different cases that are going to be most persuasive. That is why I mentioned or asked if there were such a case. We can all recite the principles. You have two leading experts on opposite sides of the fence citing law. The real question is what case comes closest to this where the outcome is the one that you are arguing for factually.

MR. LIMAN: If your Honor will give me just a moment.

I had thought, your Honor, in *Express Scripts* one of the cases involved two alternative forum. I am not sure whether that is the case or not.

Your Honor, the underlying principle remains. I hear what your Honor is saying that it will be useful to find a case that is directly on point. The Court has to construe the contract. It does have two experts that express somewhat different views. Your Honor, I would suggest that only our expert expresses the view that this clause is mandatory.

THE COURT: I thought your expert actually said it was a mistake the way it was written.

MR. LIMAN: No, your Honor. I think both of the experts say that this could have been expressed better.

THE COURT: I think everyone thought it could be expressed better. "Mistake" is a term of art in this context and I thought that your expert was coming close to saying it

was a mistake.

MR. LIMAN: Your Honor, there are a number of paragraphs where our expert expressed his view.

THE COURT: What else could it be if you are arguing for the result that you are arguing for where the language doesn't say that?

MR. LIMAN: Your Honor, it could be actually exactly what the expert says that it is, which is in paragraph 94 of his report where he says that "it is a reasonable inference that the expression 'nonexclusive' was as a result of careless drafting inserted or left in subclause 20 B in error. Perhaps because the drafter was endeavoring to convey the effect of the limited carve out in subclause 20 C of subclause 20 B when in fact the effect of subclause 20 C would have been rendered better by having the expression 'exclusive (subject to subclause 20 C jurisdiction in subclause 20 B.'" No doubt it would have been expressed better.

Their expert in paragraphs 22 and 23 says there is -- this is paragraph 22 with respect to the use of the word shall. The expert recognizes that "shall" in the ordinary circumstance suggests an imperative obligation to sue in England. That is paragraph 20. And then goes on to say, "There is no doubt that the idea" -- this is the interpretation their expert is proffering -- "could have been better expressed, but that is in my view the best way not to convict the parties of having

subscribed to an absurd contradiction." So he refers to a different kind of interpretation, avoiding absurdity. Then he goes on to 23 to say, "In this case, however, the question in this case is not whether something has gone wrong but what has gone wrong."

So, your Honor, we would agree with you that the interpretations of the competing experts do not relieve this Court from the task of interpretation. We do think that this Court has the role of interpretation. We think on the role of interpretation our interpretation is in fact the only interpretation that gives meaning to all of the words.

I am going to give your Honor the particular paragraphs within our expert's declaration, but I want to focus on a couple of words from the contract. First is the use the word "shall."

THE COURT: I got that.

MR. LIMAN: Let me give your Honor something that you may not have, which is if you look through the confidentiality deed as a whole, it is quite clear that the parties knew how to use the word "shall" when they wanted it imperative and used the word "may" when they wanted discretion. In Clause 2 of the confidentiality deed, which applies to joint and several obligations, the parties drafted "Rio Tinto and Rio Tinto, Ltd. shall be jointly and severally liable." In Clause 3 they use the word may. That provides, "Either party may provide to the

other certain confidentiality information."

In Clause 4.2 --

THE COURT: I am not sure I am understanding the point.

MR. LIMAN: The point that I am making, your Honor, is that as I read Rio Tinto's papers and as their expert says, their interpretation is one in which the word shall has to be interpreted as may. That is what their expert says.

THE COURT: You are saying that the document has shall and may in various sections?

MR. LIMAN: It shows that the parties knew how to use those terms and use them intentionally. That is how one interprets a contract. You look to see--

THE COURT: I get that.

MR. LIMAN: -- how to use the terms.

The final thing, your Honor, that I would point to is the interpretation that our expert gives. As your Honor knows, our expert says that his interpretation is not based upon the doctrine of mistake or avoiding a mistake or avoiding an error. His interpretation is based upon principles of contract interpretation. Those principles of contract interpretation are the same in England as the principles in the United States. The principles require the court to give each word its plain meaning that the principles require the court to construe contract trying to give each sentence independent meaning.

THE COURT: The only word, which is the elephant in the room, that you haven't mentioned is the word "nonexclusive." How could you make an oral argument and not deal with that unless I have asked about it?

MR. LIMAN: Your Honor, I was prepared to address that and I will. I think the answer to that is simple respectfully.

THE COURT: Is simple?

MR. LIMAN: Yes.

THE COURT: What is the simple answer to that?

MR. LIMAN: The simple answer is England is not the exclusive venue because the contract itself says that litigation can be brought in Brazil. Brazil is not the exclusive venue because litigation can be brought in England. The Second Circuit says, and the Spatt decision says, that language of exclusivity is not the test. It is one of the tests. The other test is: Does it use mandatory language such as shall? If one is to give this contract an interpretation that confers meaning on each word, your Honor has to give meaning to the word shall.

THE COURT: And no meaning to the word nonexclusive?

MR. LIMAN: And meaning to the word nonexclusive. The meaning to the word nonexclusive is that England does not have exclusive jurisdiction. It absolutely does not have exclusive jurisdiction. That doesn't answer the question whether the United States or any other venue besides Brazil is a

permissible venue.

The other portions of the report that your Honor had to look at in terms of interpreting the contract are the purpose of that first sentence of 20 B itself. Under Rio Tinto's interpretation that first sentence would have no meaning. They say, Well, the words shall can mean may. They cite not a contract case but a treatise on legislative drafting.

THE COURT: Well, I get it.

MR. LIMAN: The other provisions we would focus on is the reference to notwithstanding which would be in 20 C, which would be meaningless if their interpretation were accepted. This is very important, Clause 22, which provides for venue in Britain by saying that each party will appoint agents for service of process. It is undisputed on this record here that the first sentence of 20 B if it was only intended to permit jurisdiction in England wouldn't be necessary because 22 does that.

THE COURT: I got it.

MR. LIMAN: Therefore, it has to be given the mandatory interpretation.

Your Honor, I haven't addressed the issue of whether this comes within the scope. If you like, I could refer you to cases.

THE COURT: No. I think I am familiar with the

argument.

MR. LIMAN: Thank you, your Honor.

THE COURT: Let's hear both points from the defense and then we'll hear from plaintiff.

MR. FILARDO: Good morning, your Honor.

THE COURT: Good morning.

MR. FILARDO: Your Honor, I think as Mr. Liman opened, we do urge the Court to look at these two bases, both the exclusive forum selection clause that Mr. Liman just argued and the traditional non conveniens analysis that I am going to argue.

As independent bases to dismiss this action on forum non conveniens grounds in favor of suit in England, I wanted to highlight two important points on the forum non conveniens traditional analysis. The first being what is always undertaken by a court in this analysis is the amount of deference to give plaintiff's choice of forum here in New York in this court. This is a foreign plaintiff. This is a United Kingdom plaintiff whose home forum is England. Nearly all the eight defendants, in fact all but one, are foreign defendants. Four of the six appearing defendants have already sought your Honor's leave to if necessary to move on grounds of lack of personal jurisdiction in this court. I say for the nonappearing, the two nonappearing defendants also appear to have those kinds of personal jurisdiction objections. The

reason I am raising that is in light of those personal jurisdiction arguments --

THE COURT: Do you know how many cases I have where litigants say there is no personal jurisdiction here? That argument doesn't get you very far unless we have a motion before us.

MR. FILARDO: Understood, your Honor. The only reason I raise it here is that in *In Re Herald Primeo* case that your Honor presided over, it is a factor when you are looking at whether or not to give deference to a forum plaintiff's choice. When you look at it, it just does not give rise to an inference that New York is more convenient than England when England is the home forum. That is really the first inquiry here.

The next inquiry is whether or not there is an alternative forum. We propose to the Court that would be England. I don't think that plaintiff seriously object to that other than on one basis and that being that there are two nonappearing defendants in this case and that even though all the other defendants have consented to jurisdiction in England, those two haven't. Well, the answer to that, your Honor, is that they are not before the Court. In fact, the time for them to respond to complaint, the original complaint, in this action has long since past. The time for them to respond to the second amended complaint has now long since past. Plaintiffs have not sought to proceed against those defendants although

they have the procedural right to do so. They failed to prosecute against those defendants. I think *In Re Herald* and *Odyssey Re (London), Ltd.*, another case in the Southern District, and that is 82 F. Supp. 2d 282, in both those cases they were nonappearing defendants that did not restrict the Court's ability to dismiss the case on forum non conveniens grounds. Those are two important inquiries and I think those are the two issues that plaintiff raise in their papers.

With respect to the balancing test, public and private interest factors, this is a case about foreign parties' disputes over foreign mining rights, specifically West Africa Guinea mining rights. No parties identified witnesses in their initial disclosures to be found here in the U.S. or in New York frankly. Plaintiffs didn't even identify the two nonappearing defendants as witnesses. On the other hand, all parties identified nonparty witnesses all over the globe. Those nonparty witnesses would be difficult if not impossible to get process over to compel them to testify either at deposition or at trial here in this court. Clearly they are outside the 100-mile bubble. Most of these jurisdictions I found don't provide for a deposition-type testimony even if that could be acquired under the Hague Convention. That in and of itself is a typical basis for finding that the jurisdiction in New York to be inconvenient. I think our papers go into detail as to the additional costs that are incurred here with having to deal

with documentation of witnesses that are all over the world.

THE COURT: Sorry. With what?

MR. FILARDO: With having documents all over the world, not here in New York. I think it is limited but it bears at least mentioning.

THE COURT: Isn't that a little bit of an old-fashioned concept?

MR. FILARDO: In some respects, your Honor. It is worth noticing that there are confidentiality and other statutes would prevent the ability for us to orderly have this type of discovery whether it is electronic or otherwise. It does increase the cost and that goes into the analysis of weight at least on the private interest factors.

THE COURT: I get it.

MR. FILARDO: On the public interest factors it comes down to the connection with New York. There really isn't much, if any, connections here. Plaintiff points to an investigation that is going on in Southern District of New York. It is an investigation. It is a grand jury investigation. I am not sure of their knowledge of the facts of this investigation. It is secret after all. It is different with respect to a contact in the U.S. because that has to do with essentially whether or not the government has venue to bring that investigation here in New York. That is not the issue that we're arguing and certainly it is not the issue that is upfront in a forum non

conveniens analysis. In any event, they had argued perhaps there would be documents that would be produced to the government in the course of that investigation and that would somehow give connections here to New York. Frankly, I think any documents that were produced, were produced a few weeks ago. Only one party had them. The others had not been asked to produce documents to the government. So I think that is now minimized. There were many documents and that was done. Really that is typically what I've seen to be their sole connection here to the U.S. and to New York specifically, which is important here.

THE COURT: I got it.

MR. FILARDO: Finally, I think on the public interest factors, it has to do with the application of law. If your Honor was to find that the claims that are stated in the amended complaint arise out of the confidentiality deed that Mr. Liman was just arguing, those claims would be subject to English law. There is a question as to whether this Court has to apply English law at least to the common law claims as to Vale and perhaps to all of the defendants. If not, then there would be a split as to applying different laws to different defendants on different issues and that could cause confusion to the jury. I think our papers do outline the other elements of the balancing tests.

THE COURT: What would happen if I didn't accept your

argument hypothetically and I did accept Mr. Lyle's, then what?

MR. FILARDO: If I can restate it? If you accepted that the exclusive forum selection clause was enforced but that the traditional factors did not merit dismissal?

THE COURT: Right.

MR. FILARDO: Well, I think at that point you have to step back and take another look at whether or not there were all of the necessary parties that would be before your Honor, whether or not in the analysis of forum non conveniens whether not having really the primary defendant -- one of the primary defendants who is alleged in the complaint not before the Court whether or not that would make this trial convenient because the bottom line is to determine whether or not a trial will be convenient in the jurisdiction when you are looking at forum non conveniens inquiry.

THE COURT: By definition I would have found it was convenient; right? If hypothetically you lost the argument, I would have found at least as to your clients, it was convenient?

MR. FILARDO: I understand, your Honor.

THE COURT: Instead of being subtle there is a possibility of two different trials; right? What law would be applied if part of the case stayed here?

MR. FILARDO: If there was a possibility of two different trials, hypothetically if you denied the forum non

conveniens and then denied the personal jurisdiction motions and the 12(b) motions, which we also feel are very strong and have not had an opportunity to brief --

THE COURT: By the way, we're not doing anymore piecemeal motions for your planning going forward.

MR. FILARDO: Understood. Hypothetically other than potential motions as necessary party and so forth, we would be looking at a situation where you look at New York law, federal law with respect to the statutes, the federal statutes that are alleged here. With respect to the common law statute, I will not go there because I don't think they state a claim. I think it is clear on its face.

THE COURT: Thank you.

MR. LYLE: Thank you, your Honor. Michael Lyle on behalf of Rio Tinto.

First, your Honor, turning to the confidentiality deed if that is where the Court would like me to proceed?

THE COURT: Pardon me?

MR. LYLE: Would the Court like me to proceed first with the confidentiality deed?

THE COURT: Sure. I think you should address Mr. Liman argument first.

MR. LYLE: Thank you, your Honor. I think the Court put his finger right on the issue.

THE COURT: I wish I thought that.

MR. LYLE: The provision says nonexclusive. The issue is the document clearly states not once but twice that jurisdiction is nonexclusive both in the U.K.

THE COURT: I get that. Mr. Liman's probably most compelling argument is that it doesn't make any sense to say nonexclusive in the sense that he is saying that what the parties did hear it to say that jurisdiction is exclusive in either England or in Brazil not anywhere else. So how do you get anywhere else?

MR. LYLE: The way we get there is that the provision is a forum non conveniens provision. That is what is being done here and that is what our expert Lord Hoffman talks about in detail in his declarations. The purpose of these provisions was to set up English courts as advantageous court that allows for jurisdiction and sets up forum non conveniens waiver with one exception. So if one of the parties to this agreement filed a litigation in the courts of the U.K. in London, that jurisdiction is deferred jurisdiction. That's advantageous in that forum non conveniens is where they will be with one exception. Brazil in certain circumstances, which would be the subject of the U.K. court's discretion to send it to Brazil, which is why when you look at what the parties were focused on, foreign non conveniens issue, the structures that is in place, that is what is happening with these provisions. It is not a jurisdiction provision. It is a forum non conveniens

provision, which says the U.K. courts have jurisdiction if a party proceeds in that forum. Forum non conveniens motion is not available except in favor of Brazil. Otherwise, because the provisions repeatedly say nonexclusive, a litigation can be filed in Brazil in the first instance or in other courts in any other jurisdiction that they can establish jurisdiction, which in those events, either the Brazil courts or say the United States --

THE COURT: You just lost me. How did you get to New York?

MR. LYLE: If a litigation is commenced.

THE COURT: As here.

MR. LYLE: As here in New York unlike if it was done in the U.K. the litigation is subject to a forum non conveniens motion. The difference is if you go in the U.K. and you pick London or the courts of the U.K., you have waived forum non conveniens. Other even if you proceed in Brazil, you can still be subject to forum non conveniens. In either even because the words nonexclusive are used ambiguously, you can proceed elsewhere, i.e., in the United States but your lawsuit is subject to a forum non conveniens motion. That is what the provisions do.

What you had originally pointed to, your Honor --

THE COURT: I heard you.

MR. LYLE: In order to give effect to what Vale's

expert says, the Court would have to read nonexclusive to mean exclusive.

THE COURT: Yeah, essentially.

MR. LYLE: You would be reading a mistake. Their expert has said repeatedly in his declarations that in order to achieve the outcome that Vale urges on this Court, you have to assume that the parties made a drafting error. They used words nonexclusive not once but twice when they meant to say exclusive. That's very clearly stated by their expert repeatedly Mr. Liman read it to the Court. He said it was a result of careless drafting by the lawyers that prepared the document.

By the way, the Court asked who prepared the document. It was prepared by lawyers from Cleary Gottlieb and lawyers from Linklaters. Cleary Gottlieb on behalf Vale; Linklaters on behalf of Rio Tinto.

THE COURT: It would be usual for them to make that mistake.

MR. LYLE: It would be. That is what Lord Hoffman says. He said in his declaration, in fact, in order for you to guess what Lord Collins wants you to do, you would have to ask yourself -- you would have to find that the parties made the astonishing mistake of using a well known technical term in a diametrically opposite sense. In other words, that they use the nonexclusive when they meant exclusive.

THE COURT: I got it.

MR. LYLE: That makes no sense. Mr. Liman urged the Court that to give effect to all of the words in the document, our version gives effect to all of the words in the document.

THE COURT: Take me through that again. Nonexclusive is obvious because you contend that it can be litigating here where we are, right, not in England and not in Brazil?

MR. LYLE: Exactly. So the word shall is the other issue. If you look at what Lord Hoffman has said in his declaration that is explained in terms of a temporal reference. It is a recognition by the parties that because they have agreed that England is going to be jurisdiction, that there is going to be claims in the future. Claims shall be brought in the future in the courts of England and when they do that, they have a forum non conveniens waiver. So he gives effect to all of the provisions of the document. Vale's expert on the other hand does not. Right? He is not giving effect to all of the words in the document. In fact, he trying to give an opposite meaning to the words.

THE COURT: To one of the words. I get it.

MR. LYLE: By therefore having a mistake, Judge.

THE COURT: As Mr. Liman have you got a factually identical or similar case where this problem arose? We have not found it.

MR. LYLE: There is no case, Judge. Both of our

experts recognize that. Lord Collins recognizes it. So does Lord Hoffman. There are no cases that say that exclusive -- when the term nonexclusive is used, it means exclusive. There are no cases in where.

THE COURT: What is the implication of a mistake in your legal opinion?

MR. LYLE: The imposition of a mistake if a provision can be given the full effect of all of its words that as a matter of law interpretation is favored over an interpretation that attributes mistake. That is agreed to by the experts in the case, Judge.

THE COURT: What happens if it is a mistake?

MR. LYLE: If there is a mistake?

THE COURT: Yes.

MR. LYLE: Well, if there is a mistake then the Court has to -- the Court can do his best to reconcile the provisions and apply discretion and try to get to the parties' intent. That is what the standard would be that the Court would apply.

Also, your Honor, one other point that you were talking to Mr. Liman about. There are no cases reading the word shall in the presence of nonexclusive. So there are no cases that consider that. The case that Mr. Liman cites you to, the *Express Scripts* case that he discussed earlier, the provision in that case that was at issue in the agreement was on page 19 of that opinion and the words nonexclusive are not

in. Nonexclusive jurisdiction does not appear anywhere in that provision. So it is entirely inapplicable and does not support the proposition that he urges the Court to consider.

THE COURT: Okay.

MR. LYLE: The last point, your Honor, on the use of the word shall, even Lord Collins in his third declaration at paragraph 36 recognizes that shall can be used in circumstances to mean may. That is not what Lord Hoffman is saying, but he recognizes the word shall can be used. So what we're doing here --

THE COURT: You are giving it back to all of the words their legalese.

Mr. Liman didn't reach this argument, but I would be interested in hearing your take on the "arising out of or in connection with" argument.

MR. LYLE: With respect to the scope, the arising out of or in connection with argument, yes, your Honor, that provision -- this case, the lawsuit that we have brought is a claim for a RICO conspiracy fraud.

THE COURT: Right.

MR. LYLE: The conduct that we allege is outside of what the agreement was about. It is not arising out of or in connection with the deed. What does the deed focus on? The deed is about technical information, geological information and technical information about the mine, infrastructure

information, information about drilling, geological data and information that was being provided to Vale by Rio Tinto. That is what the deed is focused on. What our litigation is about are the rights to the mine that were stolen as part of the RICO conspiracy by Vale and Mamadie Toure.

The deed focuses on the technical information. The rights, which were stolen as part the RICO conspiracy, those rights are not a function of the deed. Those rights are a function of government action by the government of Guinea and a whole separate series of transactions and events that took place as part of the conspiracy where government officials were bribed -- Guinean government officials were bribed by the defendants to take the rights that had been conferred to Rio Tinto and converted them to none. Our allegations do not stem from technical geological information in the confidentially deed but rather the RICO conspiracy that we alleged extensively in our complaint that springs out of the conduct.

THE COURT: I got it.

Mr. Liman, I am going to give you an opportunity in a minute to address that argument because you didn't before.

You have yet another argument to make on forum non conveniens.

MR. LYLE: Yes, your Honor. Turning to what we were referring to as the traditional forum non conveniens factors. As the Court has recognized the standard that should be applied

the Court is well aware of that is cited in the *American Stock Exchange* case that this Court decides as well as the In Re *Herald* decision. It said that it should only be granted were a trial in the United States would be unjust, oppressive or vexatious and not merely inconvenient for the defendant. At arriving at a question of whether or not to grant a forum non conveniens motion, a three-prong test is applied, which is the question of how much deference should be afforded to Rio Tinto's choices of forum, whether there is an adequate alternative forum, and then the balancing of the public and private factors. So we agree on the standard.

The question of how much deference to give is a function of a sliding scale, which the Court is well aware of. In this instance the sliding scale indicates that when you look at the Rio Tinto selection of the forum, is it due to reason that the law recognizes as valid and if so more deference is given to Rio Tinto even though Rio Tinto is a foreign plaintiff. In this instance what we have is three defendants who could not be sued anywhere else other than in New York. Those three defendants are Mahmoud Thiam, who is here in New York living here in New York city, Defendant Stillins, who is here in prison in New York in connection with his conduct that stems from and related directly to the allegation of our complaint and Defendant Toure, who is here in Florida also in the United States. So we have three defendants, two of which

are here in New York city and a third defendant in Florida who are subject to courts of the United States and are not subject to jurisdiction elsewhere.

What we also have is the fact that the conduct that gave rise to the lawsuit in this case, much of that conduct took place right here in New York city. The information that Vale utilized and gained from Rio Tinto, which it ultimately utilized in furtherance of this conduct was taken here in New York city in negotiations that took place in the law offices of Cleary Gottlieb.

We also have the fact, your Honor, that Rio Tinto has significant ties to the United States, which is a distinguishing factor from the courts decision in the *In Re Herald* case. In that case none of the plaintiffs had a connection to the United States. The only remaining defendants had no connection to the United States.

THE COURT: Right. They were all Irish.

MR. LYLE: Yes. There were parallel proceedings that were existing at the time. There were hundreds of claims already in the courts of Ireland and in Luxembourg that addressed identical issues that were before this Court in that litigation. We do not have that in this case.

THE COURT: I think that's fine. I get it.

MR. LYLE: Would you like me for move to the rest of the balancing factors?

THE COURT: I don't think so. I can easily do that on my own.

MR. LYLE: Thank you, your Honor.

THE COURT: Let's hear from Mr. Liman on the arising out of or in connection with issue.

MR. LIMAN: Your Honor, I believe it is addressed at pages 7 and 8 of our opening brief. In sum the allegations of the complaint with respect to Vale, that Vale -- I am now quoting from paragraph four -- "duped Rio Tinto into revealing its confidential and proprietary information about the Simandou concession." That is an allegation that Vale obtained information, which is obtained only pursuant to the confidential deed under false pretenses that arises out of. Number two, that it used that information in a way that was not permitted. Because as your Honor knows information that is provided to Vale, Vale would be able to use for whatever reason it wanted but for the existence of the contract.

Your Honor, we would point your attention to two opinions, Judge Sullivan's opinion in *Midamines* where Judge Sullivan says that there is no case that provides a RICO exception to mandatory forum selection clause and the *Roby* case from the Second Circuit.

THE COURT: I think we all know that so that doesn't really get us there, does it? The real issue is is that clause mandatory. That's the show-stopper.

MR. LIMAN: Your Honor, I do think that is the real issue in this case. I would say with respect to whether it is mandatory, if you read nonexclusive to mean that jurisdiction lies anywhere in the world, then you can come to the conclusion that the use of the word nonexclusive was intended to permit jurisdiction to lie anywhere in the world. That is what the word nonexclusive means.

THE COURT: That is what it usually means.

MR. LIMAN: Your Honor, I don't think that is right.

THE COURT: Nonexclusive means you can go anywhere where you can get jurisdiction. You still need to get personal jurisdiction.

MR. LIMAN: Your Honor, if that is what you conclude, I think that would support their argument. If on the other hand you conclude that nonexclusive means as to the particular jurisdiction it is not limited to that jurisdiction and you could apply to others, then we win I think.

THE COURT: You think exclusive to London or Brazil?

MR. LIMAN: I think it turns on what you understand nonexclusive to mean.

THE COURT: It is fairly astonishing. Although, I guess we'll never understand why your firm and Linklaters would use the word nonexclusive when they presumably according to you meant exclusive.

MR. LIMAN: Your Honor, I think for the very clear

reason that they did not want clause 20 B to be read to exclude Brazil.

THE COURT: It said it is exclusively in London and then they have notwithstanding some claims can be brought in Brazil. The word leaps out at you. The minute we learn anything about jurisdiction, we're introduced to whether it is exclusive or nonexclusive. Certainly Cleary and Linklaters know that. That is what is so astonishing here.

MR. LIMAN: Our client is a Brazilian client and it wanted to make sure that in agreeing to jurisdiction in their hope, which was England, it was not doing anything to preclude.

THE COURT: I get that. The help that they had didn't help them reach that result. That's what is so astonishing.

MR. LIMAN: It could have been drafted better. On the other hand, the use of the word shall I think reads directly out of the cases. I don't think there is a case that says it is predictive as to what happens in the future. That is not what we do in contracts. In contracts you impose language of obligation and rights.

THE COURT: I get it. Thank you. This has been very helpful. I will get to it as soon as I can. Keep going with discovery in the meantime.

MR. LYLE: Your Honor, I apologize. You mentioned discovery and it reminded me of a point my colleague raised. We have a discovery deadline that we're past pursuant to your

Honor's order. We're continuing to work with Judge Peck. I think we're all endeavoring to proceed. When your Honor set the discovery schedule, you recognized --

THE COURT: I did. I did. So as to the next deadline if you come up with one, please run that by me.

MR. LYLE: We'll do, your Honor.

THE COURT: I am not trying to interfere with Judge Peck in that regard. As to the end date of discovery, I would like to make that determination.

MR. LYLE: Thank you, your Honor.

THE COURT: Thank you so much.

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